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Docket No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
A POLITICAL SUBDIVISION OF THE
COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF VIRGINIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE UNIFORM RELOCATION ACT DID NOT CONFER ON C&P THE BENEFITS CLAIMED IN THIS LITIGATION	1
A. C&P does not qualify under the plain language of the statute	2
1. C&P did not move personal property	3
2. C&P did not move or discontinue its business	4
B. Considering the URA in the setting of established law, its own terms, agency interpretations and related congressional action, commands the conclusion that C&P is not entitled to the claimed benefits	4
II. NRHA RESPONSES TO CERTAIN SPECIFIC ALLEGATIONS BY C&P	6
A. C&P version of the Question Presented	6
B. C&P now contends it has moved or discontinued its business	7
C. C&P asserts that the transmission lines are not real property	8
D. C&P alternatively seeks compensation for the facilities as realty	10
E. C&P asserts that the failure of the URA to mention utility relocation is not significant	11
F. The Michigan, Vermont, Rhode Island, Tennessee, Kansas, Indiana, Arkansas and Maryland cases cited by C&P are not in conflict with Petitioner's position	12
III. THE DECISION OF THE COURT OF APPEALS IMPROPERLY ALTERS LONG-STANDING RELATIONSHIPS BETWEEN STATES, LOCALITIES AND UTILITY COMPANIES	12

TABLE OF CONTENTS—Continued

Page

IV. THE URA WAS PASSED TO SUPPLEMENT THE FIFTH AMENDMENT REQUIREMENT OF COMPENSATION FOR THE TAKING OF PRIVATE PROPERTY, NOT TO PROVIDE COMPENSATION WHEN A PUBLIC WAY IS CLOSED OR TRANSMISSION LINES ARE MOVED FROM PUBLIC PROPERTY 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

	Page
Alexander v. HUD, 441 U.S. 39 (1979)	2
Beaird-Poulan, Inc. v. Dep't. of Highways, 616 F.2d 255 (5th Cir. 1980), *aff'd. per curiam*, 441 F.Supp. 866 (W.D. La. 1977), *cert. denied*, 449 U.S. 971 (1980), *reh'g. denied*, 449 U.S. 1104 (1981)	11, 12
Cass v. United States, 417 U.S. 72 (1974)	2
City of Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570 (1932)	8
District of Columbia v. Carter, 409 U.S. 418 (1973), *reh'g. denied*, 410 U.S. 959 (1973)	2
Harrison v. Northern Trust Co., 317 U.S. 476 (1943)	2
PEPCO v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971)	10, 14
Roberts Coal Co. v. Corder Co., 143 Va. 133, 129 S.E. 341 (1925)	10
Transcontinental Pipe Line Corp. v. Prince William County, 210 Va. 550, 172 S.E.2d 757 (1970)	8, 9
Truslow v. Bell, 166 Va. 608, 186 S.E. 71 (1936)	10
Whitman v. State Highway Comm'n, 400 F.Supp. 1050 (W.D. Mo. 1975)	11, 12

Statutes

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§ 4601-4655	*passim*
42 U.S.C. 4601(7)	8
42 U.S.C. 4622(a)(1)	3
42 U.S.C. 4622(a)(2)	3, 4
42 U.S.C. 4652	10, 11
Federal-Aid Highway Acts of 1956, 1958 and 1968, Pub. L. No. 84-627, 87 Stat. 250 (1956), Pub. L. No. 85-831, 72 Stat. 89 (1958) and Pub. L. No. 90-495, 82 Stat. 815 (1968)	5
District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812 (1972)	5

TABLE OF AUTHORITIES—Continued

Congressional Reports

	Page
House Select Subcomm. on Real Property Acquisition, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, Committee Print No. 31, 88th Cong., 2d Sess. 1-25 (1964)	3
Uniform Relocation and Land Acquisition Policies —1970: Hearings on H.R. 14898, H.R. 14899, S.1 and Related Bills Before the House Comm. on Public Works, 91st Cong., 1st and 2nd Sess. 1026, 1031 (1969-1970)	3
Uniform Relocation Assistance and Land Acquisition Policies Act of 1969: Hearings on S.1. Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations, 91st Cong., 1st Sess. 164-69 (1969)	3-4
S. Rep. No. 98-71, 98th Cong., 1st Sess. (1983)	5, 6, 13, 14

Miscellaneous

2 Nichols, *Law of Eminent Domain* § 5.22[3] (3d ed. 1981)	11

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PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

I. THE UNIFORM RELOCATION ACT DID NOT CONFER ON C&P THE BENEFITS CLAIMED IN THIS LITIGATION.

The Respondent, the Chesapeake and Potomac Telephone Company of Virginia ("C&P"), has balanced its argument on the narrow issue formed in the following two statements:

> The question here presented is answered by the plain terms of the Act itself.
>
> . . . The statutory language directly applicable to C&P's claims is not susceptible of any interpretation which would exclude such claims.

Respondent's Brief on the Merits at 4, 5.

The Petitioner contends that C&P does not qualify under the plain language of the URA.[1] This conclusion is fortified when the statute is construed, as it should be,[2] in light of:

a) the common law existing at the time of its enactment;

b) the problem which Congress sought to correct in passing the URA;

c) the structure of the URA as a whole;

d) Federal agency interpretations of the URA subsequent to its passage; and

e) other Congressional action taken before and after passage of the URA.

A. C&P does not qualify under the plain language of the statute.

The pertinent elements of expense that are compensable for a displaced person under Section 202(a) of the URA are:

---

[1] The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§ 4601-4655.

[2] This Court considered more than the plain language of the statute in *Alexander v. HUD*, 441 U.S. 39 (1979) when it was called on to construe the "written order" clause of the URA. In doing so the Court said:

> The statutory language is susceptible of either construction. However, an examination of Congress' purpose in adopting the relocation act, the legislative history of Section 101(6), and the structure of the act as a whole persuades us that HUD's interpretation more nearly reflects the intended scope of the assistance program.

See also *Cass v. United States*, 417 U.S. 72, 77-79 (1974); *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973), *reh'g. denied*, 410 U.S. 959 (1973); *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

(1) actual reasonable expenses in *moving* himself, his family, business, farm operation, or *other personal property*;

(2) actual direct *losses of tangible personal property as a result of moving or discontinuing a business* or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency.

42 U.S.C. 4622 (a)(1) and (2) (Emphasis added).

1. *C&P did not move personal property.*

The utility company is not eligible for benefits under Section 202(a)(1). C&P did not move property, it abandoned property. Federal Respondent's Brief on the Merits at 30-32 and Joint App. 133-34, 150, 153-54. This abandonment cannot be construed as tantamount to a move under the URA because it was not the kind of expense the Congress sought to compensate.

The legislative history of the URA details the problems encountered by individuals who were forced to move their furniture without any compensation and the "Mom and Pop" businesses which had to gather up their stock in trade and move to another location, all without any compensation. The consistent and frequent references to such everyday problems, caused directly by the taking of private real property, strongly suggest that the Congress was concerned with, and legislated with respect to, those ordinary items of tangible personalty, not the massive concrete structures which C&P built and voluntarily left in place.[3]

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[3] See House Select Subcomm. on Real Property Acquisition, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs*, Committee Print No. 31, 88th Cong., 2d Sess. 1-25 (1964); *Uniform Relocation and Land Acquisition Policies—1970: Hearings on H.R. 14898, H.R. 14899, S.1 and Related Bills Before the House Comm. on Public Works*, 91st Cong., 1st and 2nd Sess. 1026, 1031 (1969-1970); and *Uniform Relocation Assistance and Land*

The URA focuses on traditional concepts of land acquisition involving the power of eminent domain, and the normal, direct effect thereof on an individual or a business causing a displaced person to gather up its belongings and move to a new location. This sort of removal is not compensated in traditional eminent domain procedures; the Congress, thinking that to be unfair, enacted the URA to supplement compensation in eminent domain. This supplement did not benefit C&P, however, because C&P lost no property rights under the threat of condemnation.

2. C&P did not move or discontinue its business.

Nor did C&P suffer a direct loss of tangible personal property as a result of *moving or discontinuing a business.* 42 U.S.C. 4622 (a)(2). No part of the C&P business has been moved or discontinued.[4] Throughout the re-routing of the C&P lines, telephone service remained continuously available. Joint App. 154. The only change in the C&P operation was the re-routing of some transmission equipment to a new portion of the public street system in Norfolk.

Accordingly, there is no requirement under the "plain language" of the statute to pay any relocation expenses to C&P.

B. Considering the URA in the setting of established law, its own terms, agency interpretations and related congressional action, commands the conclusion that C&P is not entitled to the claimed benefits.

In the Petition for Certiorari and in its Brief on the Merits the Petitioner has argued that:

Acquisition Policies Act of 1969: Hearings on S.1. Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations, 91st Cong., 1st Sess. 164-69 (1969).

[4] As to this point, it is noteworthy that the C&P complaint in the District Court sought compensation only for moving personal property. It did not allege that it had discontinued its business. Joint App. 7-14.

a) Under the common law of most states, including Virginia, at the time of passage of the URA, a utility company was obligated to move its transmission lines from a public way at its expense.

b) Neither the URA nor its legislative history make any express provisions for reimbursement of the costs of such relocation.

c) The Federal agencies which administer the URA make no provision in their regulations for such reimbursement, and the HUD regulations deny such payments unless required under state law.

d) When Congress wanted to cover utilities, as it did in the Federal-Aid Highway Acts and the District of Columbia Public Utilities Reimbursement Act of 1972,[6] the matter was discussed in committee reports and dealt with explicitly in the statutes.

Since the Petitioner's Brief on the Merits was prepared the Senate has once again dealt with this problem; and once again it has been very specific. S. 531, the Uniform Relocation Act-Amendments of 1983, was passed by the Senate on May 20, 1983. The bill provides explicitly for the reimbursement of the cost of relocating utility company transmission lines where such relocation is caused by a wholly Federal project, but where the relocation is caused by a federally-assisted program S. 531 leaves the matter of such reimbursement to state law. The Committee Report describes the provision of assistance to utilities in Federal programs as *expanding* the definition of a "displaced person." S. Rep. No. 98-71, 98th Cong., 1st Sess. 11 (1983). The provisions leaving to state law the displacement of utilities in federally-assisted pro-

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[6] The Federal-Aid Highway Acts of 1956, 1958 and 1968 are Pub. L. No. 84-627, 87 Stat. 250 (1956), Pub. L. No. 85-831, 72 Stat. 89 (1958) and Pub. L. No. 90-495, 82 Stat. 815 (1968). The District of Columbia Public Utilities Reimbursement Act of 1972 is Pub. L. No. 92-495, 86 Stat. 812 (1972).

grams reflects "current relocation practices of the Federal, State and local agencies covered under this act". *Id.* at 56. The provisions of S. 531 relating to utilities were deemed necessary to correct the error of the United States Court of Appeals for the Fourth Circuit in the instant case. *Id.* at 57.

Thus, in each instance where Congress intended to deal with the relocation of transmission lines, it has been very explicit. This strongly suggests that silence as to this matter in the language of the URA, and in its legislative history, indicates that Congress did not intend to deal with the complex problem of relocating utility transmission lines. The common law of the several states takes care of this situation, and there is no indication of an intention on the part of Congress to change established state law.

II. NRHA RESPONSES TO CERTAIN SPECIFIC ALLEGATIONS BY C&P.

Petitioner has anticipated and answered most of the C&P contentions in its Petition and its Brief on the Merits, but there are certain specific contentions set out in Respondent's Brief which petitioner must challenge.

A. C&P version of the Question Presented.

The C&P version of the Question Presented attempts to disassociate C&P from any obligations under its Franchise Agreement, denying that its relocation was effected from "public rights-of-way." The record is not clear as to what human being, if any, actually asked C&P to relocate its lines. The need to relocate was so obvious that it is likely that no one ever articulated a request. The record *is* clear that C&P, the City of Norfolk and NRHA engaged in a cooperative undertaking designed to accommodate the re-routing of public and private utilities from one public space to another with the least inconvenience. Joint App. 164-81. C&P was normally advised of a street closing in advance by the City. Joint App.

106. The ultimate location of its lines had to be compatible with the redevelopment project and C&P acquiesced in the planned relocation whether asked by Norfolk or by NRHA. Joint App. 135-36. Well before the streets were closed, C&P, the City and NHRA employed the same engineers to plan the new locations within the new rights-of-way. Joint App. 177-80. The entire rerouting of lines was from one location in public property to another public location, and it was done under the pattern of rights and obligations which were established by the Franchise Agreement and the common law. C&P knew it must relocate its lines to maintain continuous service, Joint App. 154, and no indication was given until considerably later that it wanted or expected reimbursement.

B. C&P now contends it has moved or discontinued its business.

C&P argues that it qualifies for benefits as a person who "moves" or "discontinues his business." Respondent's Brief on the Merits at 6. Obviously, C&P has not *moved* or *discontinued* its business and Petitioner has noted *supra.* Note 4, that this assertion was not contained in C&P's original complaint. What C&P did was to construct new vault-manholes and conduits and install new cable in the new street rights-of-way.[6] The utility at-

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[6] Richard Tucker, Field Engineer for C&P, described the process as follows:

> A. The first thing is the manholes are constructed to verify that we have them in a usable location. And the conduit is placed between the manholes, new cable is pulled in those sections, and then the new cable is cut at either end into what is going to remain, and the old cables are pulled out. The old conduit, or the old manholes are covered up and the job is completed.
>
> Q. But does the service continue?
>
> A. The services always continue.

Joint App. 153, 154.

tempts to evade this fact by arguing that Section 101 of the URA defines the word "business" to mean any lawful activity, 42 U.S.C. 4601(7), and that when it discontinues any lawful activity (i.e., a transmission line) it discontinues its business. This is manifestly not what Congress had in mind when it referred to discontinuing a business. Instead, Congress sought to cure the disproportionate burdens on the small businessman who must discontinue his sole means of livelihood and move his stock in trade to a new location.

While C&P asserts that "the language of these provisions is in no way capable of being read as having two or more possible meanings . . . .", Respondent's Brief on the Merits at 7, it seeks to distort the meaning of the term "move or discontinue his business" to include a situation in which there is no business which is moved or discontinued.

C. C&P asserts that the transmission lines are not real property.

Petitioner disputes C&P's bald assertion that "[i]t is not the law of Virginia or of any other state that utility lines built in public streets are real property." Respondent's Brief on the Merits at 9. To the contrary, the Supreme Court of Virginia held that this is the law of Virginia in *City of Newport News v. Warwick County*, 159 Va. 571, 603, 166 S.E. 570, 581 (1932). There the Virginia court ruled that a system of waterworks consisting of water mains, gates, hydrants and connecting pipes were fixtures attached to the land and had become realty. Part of the system was installed under land owned in fee by the utility and part beneath the public highway. The entire system was classified as realty.

Each side has relied on *Transcontinental Pipe Line Corp. v. Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970) in support of its interpretation of the proper classification of the underground facilities. NRHA ar-

gues that *Transcontinental* declares that utility lines imbedded in the earth become a part of the realty. C&P argues that this is only true when the utility owns the realty. Yet on April 21, 1972, C&P wrote the Commissioner of Revenue of the City of Norfolk, saying:

> As we discussed at our Tuesday meeting, it is the Company's position that a proper application of the rule of the *Transcontinental* case requires that the following company property be reclassified as real property:
>
> pole lines
> conduit
> wire lines
> central office equipment

Joint App. 293-94.

Thus in 1972, two years after passage of the URA, C&P confirmed that the facilities involved in this litigation were in fact realty, meeting the tests set out in *Transcontinental.* At that time C&P sought to reduce its taxes. It now adopts a reversed position in order to obtain a windfall payment under the URA.

These communication facilities are massive. Cables measuring one to three inches in diameter, holding as many as 3600 individual wires, are pulled through plastic conduits about four inches in diameter which have been laid in groups of up to twenty pipes in pipeways some fourteen to sixteen inches wide and three feet deep. The pipeways run between concrete vaults buried in the ground which are accessible from the surface of the street through manholes. The concrete vaults are about twelve feet long, six feet wide, seven feet deep on the inside and about a foot thick. The cables are probably the part of the system most likely to deteriorate, but they have an expected life of about forty years and are put in place to stay there for that length of time. Joint App. 97, 110-22, 131. Certainly for the purposes of the URA these

structures are not the sort of property contemplated by the Congress when it sought to alleviate the burden on individuals and businessmen who had to pack up and move items of personal property from one location to another.

D. C&P alternatively seeks compensation for the facilities as realty.

C&P, for the first time on page 33 of its Brief on the Merits, asserts that if the facilities are not personalty, then they must be treated as realty under 42 U.S.C. 4652. One flaw in this argument is that C&P did not own the land into which the facilities were placed, and when the facilities became a part of that realty they were not a part of C&P realty. It is the law in Virginia that buildings and improvements annexed to realty become a part of that realty and inure to the benefit of the owner of that realty. *Truslow v. Bell*, 166 Va. 608, 617, 186 S.E. 71, 74 (1936). Only when a person puts improvements on land belonging to another, under a *bona fide* belief that he has good title to that land, is he entitled to compensation for those improvements. *Roberts Coal Co. v. Corder Co.*, 143 Va. 133, 140-41, 129 S.E. 341, 344 (1925).

Another flaw in C&P's argument is that it ignores the true nature of the franchise and the rights conferred thereby on C&P. We have cited *PEPCO v. Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971), as holding that a franchise, such as the one under which C&P and its predecessors located their lines, creates no property rights. The text writers are in accord.

> . . . [W]hen a franchise is, by its terms, . . . expressly subject to the right to amendment, alteration or repeal by the legislature, an amendment, alteration or repeal of the franchise, however much pecuniary loss it may inflict upon the holders of the franchise, is not a taking of their property in the constitutional

sense because they had no property right in an irrevocable franchise.

2 Nichols, *Law of Eminent Domain* § 5.22[3] (3d ed. 1981).

In this case, where the franchise was revocable, C&P never acquired any property rights. C&P is not entitled to any compensation under 42 U.S.C. 4652.

E. C&P asserts that the failure of the URA to mention utility relocation is not significant.

C&P argues that lack of any specific reference in the URA to utility relocation is not significant. Respondent's Brief on the Merits at 17. Respondent asserts that a particular element of relocation expense can be eligible even though not specifically mentioned in the URA, citing as examples: *Beaird-Poulan, Inc. v. Dep't. of Highways*, 616 F.2d 255 (5th Cir. 1980), *aff'd. per curiam*, 441 F.Supp. 866 (W.D. La. 1977), *cert. denied*, 449 U.S. 971 (1980), *reh'g. denied*, 449 U.S. 1104 (1981); and *Whitman v. State Highway Comm'n*, 400 F.Supp. 1050 (W.D. Mo. 1975).

Beaird-Poulan permitted recovery of the costs of moving manufacturing and assembly operations of a chain saw plant to a new site. The move was caused by acquisition of three acres of Beaird-Poulan property, which rendered the remaining site too small for needed and planned expansion. No part of the Beaird-Poulan plant was located on the three acres actually acquired. C&P argues that because the *Beaird-Poulan* court allowed removal costs caused by a taking of property other than that on which the plant was situate, the language of the URA is broad enough to cover the costs of a utility company in moving its lines from public property.

Beaird-Poulan is distinguishable from the instant case because it involved moving personal property as a direct result of the acquisition of claimant's land. Hence *Beaird-Poulan* is consistent with the position of NRHA.

No land was acquired from C&P. The real significance of *Beaird-Poulan* is that the court looked at the legislative history and the congressional purpose behind the URA to determine what the "plain" language of the statute meant. In the case *sub judice*, C&P argues against any such logical reference to the legislative history or the purpose of Congress when it passed the URA.

Whitman logically held that billboards were "structures" within Section 302 of the URA and required the Highway Commission to acquire the billboards along with the land on which they stood. The billboards were real estate for the purposes of the URA. There is no benefit to C&P in *Whitman*. The court found that the claimant had a leasehold property interest. In this case, C&P has no compensable real property interest. In *Whitman* as in *Beaird-Poulan*, the court did not restrict itself to the plain language of the statute, but looked to the legislative history as an aid in determining the intent of Congress.

F. The Michigan, Vermont, Rhode Island, Tennessee, Kansas, Indiana, Arkansas and Maryland cases cited by C&P are not in conflict with Petitioner's position.

Respondent's reliance on the several state court decisions referred to at pages 22 and 23 of its Brief on the Merits is misplaced. These cases all recognized the common law rule relied upon by the Petitioner, but in each instance the court held that a state statute had changed the common law. This is consistent with Petitioner's argument.

III. THE DECISION OF THE COURT OF APPEALS IMPROPERLY ALTERS LONG-STANDING RELATIONSHIPS BETWEEN STATES, LOCALITIES AND UTILITY COMPANIES.

C&P is a privately owned, for profit, state controlled utility providing telephone service to its subscribers in the state of Virginia. The company's income is derived from

charges permitted under a rate system approved by the State Corporation Commission. The nature of the rate making process was described in the Brief Amicus Curiae filed by the National Institute of Municipal Law Officers (NIMLO) at pages 8 and 9. Rate making is a finely tuned, complex process with considerable state and local, economic and political overtones. One of the assumptions on which this process depends is that although the utility will not have to pay for the privilege of placing its lines in the public streets of a locality, it will have to pay to relocate or re-route those lines when requested to do so by the locality, and the approved rates must provide funds to meet this expense. A few other states, and even one locality in Virginia, do not follow this rule; but the rule they do follow is well known and is established by express language used by the appropriate legislative body. As NIMLO argues, any change in these state and local rules should be made by the legislatures, not the courts. NIMLO Brief on the Merits at 10, 11.

IV. THE URA WAS PASSED TO SUPPLEMENT THE FIFTH AMENDMENT REQUIREMENT OF COMPENSATION FOR THE TAKING OF PRIVATE PROPERTY, NOT TO PROVIDE COMPENSATION WHEN A PUBLIC WAY IS CLOSED OR TRANSMISSION LINES ARE MOVED FROM PUBLIC PROPERTY.

The Senate Committee on Governmental affairs, in its Report to Accompany S. 531, specifically commented that the URA was restricted to acquisitions which are supported by eminent domain. S. Rep. No. 98-71, 98th Cong., 1st Sess. 57 (1983). The exercise of the power of eminent domain is directed at the acquisition of private property for public purposes. In such cases the Fifth Amendment requires just compensation for the taking, but not for the incidental but predictable expense of moving personal property because of such taking. The heart of the matter is the acquisition of private property.

The leadership of the Senate Committee took unusual pains to set out their views on the question of utility relocation expenses and appended a carefully prepared statement to the Committee Report, which included the following:

> It is just such a distinction that the committee believes the Fourth Circuit Court of Appeals failed to apply in the case, C&P Telephone v. Norfolk Housing and Redevelopment Authority, et al (Norfolk). In Norfolk the court held that the acquisition triggering C&P's displacement occurred when NHRA, a State agency, used Federal funds to acquire the private property abutting the city of Norfolk's easement, which C&P's transmission lines occupied. When NHRA subsequently ordered C&P to vacate the property following the city's closing of the street, C&P became, in the court's eyes, a displaced person, eligible for a relocation payment under this section. The ruling overlooked, however, the question of whether NHRA could have forced the city to vacate its duly acquired easement. Assuming it could not (NHRA's eminent domain powers being the same as the city's), the transfer of control over the property between the city and NHRA constituted an unencumbered transaction on the open market. The committee observes that only acquisitions which are supported by eminent domain are presently covered under the act. *Ibid.*

Viewing the instant case from the standpoint of land acquisition, there is no basis for the C&P claim. While NRHA did acquire private real property, it did not acquire any from C&P. The acquisition occurred when NRHA purchased or condemned the parcels of land abutting the public streets. This acquisition had no effect on any C&P rights derived from the Franchise with the city. Under Virginia law this franchise created no compensable property rights in C&P. *PEPCO v. Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971). Hence, no benefits are payable to C&P under the URA.

CONCLUSION

The judgment of the Court of Appeals is wrong, and should be reversed. If the opinion is allowed to stand there will be a substantial shift in the purposes for which federal funds are spent and an unexpected burden on local governments without any legislative judgment that these changes are in the best interests of the public. The C&P claim should be denied.

Respectfully submitted,

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